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2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF NEW YORK
4 -----
5 XUEDAN WANG, on behalf of herself
6 and all other similarly situated,
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8 Plaintiffs,
9
10 vs. 12-CV-0793 (HB)
11
12 THE HEARST CORPORATION,
13
14 Defendant.
15 -----
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17
18 CONFERENCE CALL
19 Tuesday, January 22, 2013
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24 Reported by:
25 Joan Ferrara

Plaintiffs' counsel may ask about the discussions between Hearst and declarants but not regarding counsels' mental impressions. Any privilege was waived by the contents of the declarations revealing some of the discussions. Hearst also is ordered to produce the declarants' resumes if they exist.

January 23, 2013

SO ORDERED:


Hon. Andrew Jay Peck
United States Magistrate Judge

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CHAMBERS: Good afternoon.
Judge Peck's chambers.

MR. SWARTZ: Hello. How are
you? I'm here with both parties in
Wang versus Hearst Corporation with a
discovery dispute during a deposition.

CHAMBERS: Okay. I believe
maybe I spoke with either your
co-counsel or opposing counsel this
morning.

MR. SWARTZ: Right.

CHAMBERS: The judge is out. So
if you let me know what the dispute
is, I can e-mail him and see if I can
get a response back.

MR. SWARTZ: Sure. I'll go
first, because I'm the one reading it.

CHAMBERS: And your name?

MR. SWARTZ: Sure. My name is
Justin Schwartz, S-W-A-R-T-Z.

CHAMBERS: And what is the
number for the case?

MR. SWARTZ: The number for the
case is 1:12-CV-00793.

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CHAMBERS: Okay. And the issue?

MR. SWARTZ: Okay. There are two issues. I represent the plaintiffs and we're taking the deposition.

The first issue is that the defendants have raised privilege and a work product defense to certain questions that we're asking this witness about conversations that led up to him signing a declaration.

By way of background, Hearst produced dozens of declarations very recently right at the end of discovery and some of which, including this one, they've had for quite some time.

The Court gave us a short extension to take as many depositions as we could from these declarants, and that's what we're trying to do now, basically three a day.

CHAMBERS: Okay.

MR. SWARTZ: This witness is a class member, a putative class

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member --

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MS. LANGLAIS: Well, go ahead.

4

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MR. SWARTZ: This witness is a putative class member who worked as an intern during the period that this lawsuit covers.

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CHAMBERS: Okay.

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MR. SWARTZ: And there are a couple of points that we'd like to make.

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The questions that we were asking him were about the conversations that he had with Hearst's in-house counsel at the time, around the time he signed his declaration, and whether Hearst's counsel made certain disclosures to him.

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He is currently a --

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CHAMBERS: May I interrupt you for one moment?

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MR. SWARTZ: Sure.

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CHAMBERS: I'm just looking up the district. I'm wondering -- how

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2 much time do you have left for the
3 deposition? I'm not sure where you're
4 located.

5 MR. SWARTZ: We're in New York.

6 CHAMBERS: If you wouldn't mind
7 holding on for a moment, I'm going to
8 see if the district judge is available
9 because I'm afraid in me e-mailing
10 this to the judge, I may lose some of
11 your points.

12 MR. SWARTZ: Yeah, that's okay.
13 Thank you.

14 CHAMBERS: Okay. If you would
15 just hold on.

16 (Pause)

17 CHAMBERS: Counsel?

18 MR. SWARTZ: Hello.

19 CHAMBERS: Unfortunately Judge
20 Baer is out. So my hope that he could
21 handle it won't work.

22 So if we can just start over,
23 but if you can make your arguments as
24 short as possible because I'm going to
25 have to summarize what you're saying

1
2 and send it to the judge.

3 MR. SWARTZ: Sure. I'd be glad
4 to.

5 We also have a suggestion. We
6 can send the transcript of this call,
7 we can e-mail it to you pretty quickly
8 and you could send that to the judge
9 if you want to relieve yourself of the
10 need to take notes.

11 CHAMBERS: Oh, I mean if you can
12 do that, that may be easiest.

13 MR. SWARTZ: Okay.

14 CHAMBERS: Just so that way I'm
15 not misconstruing what either of you
16 are saying.

17 MR. SWARTZ: Sure.

18 CHAMBERS: So I guess if you
19 just wanted to go forward with both of
20 your issues and then I can wait for
21 the transcript.

22 MR. SWARTZ: Sure.

23 There are two issues. One is an
24 assertion of privilege, of attorney
25 client privilege and work product.

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2 The second is a document production
3 issue.

4 The first issue with respect to
5 attorney client privilege and work
6 product, here are the important facts.

7 The declaration that led to this
8 deposition, the witness' declaration,
9 was taken with the assistance of the
10 defendant's in-house counsel.

11 The questions that I'm asking
12 that the company has asserted
13 privilege for are about the process
14 surrounding taking that declaration.

15 The witness is a putative class
16 member in the class that this case
17 involves. He's a former intern. He
18 worked during the putative class
19 period.

20 He is not only a putative class
21 member under Rule 23 for the New York
22 Labor Law claims in this case, but
23 he's also a potential member of the
24 FLSA collective.

25 He is a current Hearst employee.

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2 So after he finishes internship, he
3 kept working for Hearst, but he's not
4 a supervisory employee. He supervises
5 one full-time employee and in one what
6 Hearst calls freelancer, but he's not
7 in the type of role that would put him
8 in the group that under New York Law,
9 the Neisig Group, he's not the type of
10 employee who can bind the company with
11 his statements.

12 That's a similar concept to not
13 being in the control group, although
14 New York doesn't use the control group
15 concept, it uses a similar concept
16 under Neisig versus Team One.

17 So he's not a supervisory
18 employee. He's not the type of
19 employee that is automatically
20 represented by the company's counsel
21 just because of his position.

22 A CEO is that type of employee.
23 High level supervisors are that type
24 of employee. But the witness is, with
25 all respect, a relatively low-level

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2 employee. He was an intern and then
3 he had two freelance -- or then he had
4 a freelance job with the company, and
5 this is sort of his entry-level
6 position as a paid staff employee of
7 the company. So he's not anywhere
8 near the control group or the type of
9 employee that could bind the company.

10 Therefore, he's not
11 automatically represented by counsel
12 just by virtue of his position with
13 the company.

14 There are some other important
15 facts.

16 During this deposition, the
17 witness has asked several questions
18 about his view on what the company
19 would have done or should have done.

20 Counsel objected and made it
21 very clear, she said he's not speaking
22 for the company, he's speaking as an
23 employee of the company.

24 So she said he's not speaking on
25 the company's behalf, essentially he

1
2 can't bind the company, which means
3 that he can't possibly fall within the
4 Neisig control group test. Again,
5 he's a relatively low-level entry
6 employee. Another important fact, he
7 is a member of the FLSA collective.

8 Judge Baer ordered notice to go
9 out months ago and Hearst was required
10 to produce a class list. This witness
11 was not on the class list and he never
12 received notice.

13 So Hearst obviously knew about
14 him because they were in the process
15 of getting his declaration. They knew
16 that he was an intern, they knew that
17 he worked there during the relevant
18 period, but they didn't put him on the
19 class list and he never received
20 notice.

21 Another important point, one of
22 the questions that I was trying to ask
23 this witness is whether he, when he
24 was talking to Hearst lawyers, whether
25 he was warned that doing this

1
2 declaration, submitting a declaration
3 in an opposition to the plaintiff's
4 claims in this case, could harm his
5 potential to recover money in this
6 lawsuit, a very important disclosure
7 that a lawyer needs to give a witness
8 when that witness is adverse to them.

9 And as a potential class member,
10 he is adverse to them. The in-house
11 lawyer had an obligation to tell him
12 that what he was doing could harm his
13 opportunity to recover.

14 There is no indication that she
15 did tell him that, but counsel has
16 stopped us from asking him that.

17 Another important point is that
18 Hearst has waived any privilege or
19 work product objections because in the
20 very declaration that we're taking
21 this deposition about, Hearst included
22 language that said "before I provided
23 the information for this statement,
24 certain information was communicated
25 clearly to me, including that my

1 participation was voluntary" -- and a
2 number of other things.

3 That opened the door for asking
4 what other information was provided to
5 him.

6 So Hearst has cherry-picked what
7 information it wants to put in the
8 declaration that its lawyer told him.

9 We would like to find out the
10 full picture, especially whether he
11 was advised and whether other
12 witnesses were advised of the fact
13 that they were harming their rights by
14 submitting this declaration.

15 And again, the most important
16 point is that this is a putative class
17 member. This is somebody who worked
18 there during the class period.

19 It was never disclosed to us,
20 even when Judge Baer ordered them to,
21 and his declaration was dropped in our
22 lap at the last minute at the end of
23 discovery, after having been taken a
24 long time before.
25

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2 So we're here taking this
3 deposition now and we'd like to be
4 able to ask questions about how the
5 declaration came about.

6 That's issue number one.

7 Maybe my opposing counsel would
8 like to address that and then there
9 would be another issue.

10 CHAMBERS: Okay.

11 MS. LANGLAIS: Hi. This is
12 Alison Langlais for Hearst. I can
13 spell that for you.

14 CHAMBERS: Okay.

15 MS. LANGLAIS: Alison,
16 A-L-I-S-O-N. My last name is
17 Langlais, L-A-N-G-L-A-I-S. I'm with
18 Proskauer Rose.

19 CHAMBERS: Okay.

20 MS. LANGLAIS: I'll try to keep
21 it as succinct as possible.

22 We are of the opinion that there
23 is a large number of case law that
24 states that conversations between
25 counsel and employees of any levels

1
2 are protected by privilege for the
3 purpose of fact gathering and
4 declaration gathering in the class
5 context.

6 I'm also not aware that -- this
7 particular employee is not a part of
8 the collective. There was an opt-in
9 period. He did not join for whatever
10 reason.

11 He has stated today in giving
12 his testimony that he has no interest
13 in being a part of this collective,
14 and he is not a part of the
15 collective.

16 There is no putative class
17 currently. There is no FLSA putative
18 class. The opt-in period is already
19 closed. Therefore, there are only
20 class members. And there is no Rule
21 23 class yet that has been certified.

22 Regarding the insinuation that
23 Hearst was doing something unethical
24 and not providing particular
25 information to individuals who

1
2 provided declarations, I merely
3 instructed the witness not to disclose
4 the substance of conversations, and so
5 he did not.

6 There's been no insinuation or
7 no mention that Hearst did not follow
8 its ethical obligations or failed to
9 provide particular information
10 whatsoever.

11 There is also no way that by
12 indicating in a declaration that the
13 witness provided the information
14 voluntarily that the entire substance
15 of a conversation is therefore subject
16 to discovery.

17 I just want to restate that this
18 particular witness is a current
19 employee. He has been an employee for
20 the duration basically of this
21 lawsuit.

22 And so our conversations with
23 him and after speaking with him for
24 purposes of collecting information for
25 a declaration, he has voluntarily

1
2 chosen to participate in the defense
3 of the company in this lawsuit.

4 Again, he has stated on the
5 record he has no interest in pursuing
6 any claims against the company.

7 Therefore, counsel's
8 conversations with him in pursuing its
9 defense against plaintiff's claims
10 would be privileged.

11 CHAMBERS: Okay.

12 MR. SWARTZ: Just a very short
13 reply. This is Justin Swartz.

14 First of all, I just want to
15 make clear, we're not asking for
16 counsel's notes. We're not asking for
17 counsel's mental impressions. We're
18 asking the witness what happened at a
19 conversation.

20 And so, you know, to the extent
21 that they're claiming that there is
22 work product at issue, that work
23 product, we're not asking for that
24 work product. We're asking for a
25 witness' recollection what happened

1
2 during a conversation.

3 And just to respond to the fact
4 that, at counsel's point, that this
5 witness did not join the lawsuit, this
6 witness didn't know he could join the
7 lawsuit because his identity was
8 hidden from class counsel, even when
9 Judge Baer ordered that it be
10 provided -- there is no possible way
11 that Hearst didn't know about this,
12 that this person was a potential class
13 member when they provided the Court
14 ordered class list.

15 He was not on the class list.
16 He was also not on the Class e-mail
17 list. So we didn't have his mailing
18 address. We didn't have his e-mail
19 address.

20 Hearst knew very well that he
21 existed because they were in the
22 process of collecting a declaration
23 from him.

24 The fact that there is no class
25 certified does not mean that he

1
2 doesn't have valuable rights.

3 Even though he didn't opt in to
4 the FLSA collective action, which he
5 didn't know about until today, he's
6 still a putative class member in the
7 Rule 23 class.

8 Unless he opts out, which he has
9 not done, he's entitled to
10 compensation if we prevail.

11 And there is no indication that
12 he's going to opt out of the case
13 because he hasn't even gotten notice
14 of the case. So he doesn't even know
15 what he would possibly be opting out
16 of.

17 With respect to the waiver
18 issue, they have waived any privilege,
19 if there is one, because again in the
20 last paragraph of the declaration
21 Hearst describes a good portion of the
22 conversation between counsel and this
23 witness.

24 Again, it says that it was
25 communicated to him a number of

1 things, that his participation was
2 voluntary, that no adverse consequence
3 would result from his participation,
4 that he wouldn't be retaliated against
5 if he declined to participate, that he
6 wouldn't receive any positive
7 employment consequence or other
8 benefit if he did participate.
9

10 Those are all very good things
11 that the lawyer told him. But the
12 lawyer should have told him a number
13 of other things, including that this
14 case existed, that he had potential,
15 the potential to recover in this case.

16 Counsel wouldn't let us --
17 wouldn't let the witness answer the
18 question as to whether that important
19 warning was given to him and
20 whether -- and he said that nobody
21 else at the company gave him that
22 warning.

23 So there is a clear conflict
24 situation here where you have a lawyer
25 purporting to represent an individual

1
2 who has active live claims against
3 that person as a putative class
4 member.

5 MS. LANGLAIS: Can I just
6 clarify something for the record?
7 Counsel keeps saying that we've had
8 these declarations for months.

9 The witness signed this
10 declaration on the 2nd day of January
11 of this year, and therefore if it was
12 collected around that time, there is
13 no way that Hearst would have known
14 about his identity if he was, in fact,
15 a potential member of the class and
16 was omitted from the class list at
17 some time long ago. This declaration
18 was collected within the last 3 weeks.

19 The other thing I wanted to
20 mention, again, if this was jumbled at
21 all for the record, the reason that
22 there has been no opting out of the
23 Rule 23 class is that no class has
24 been certified, no notice has been
25 served, he has not yet had an

1
2 opportunity to opt out.

3 And again, if there is some
4 attention paid to what has already
5 been stated on the record, he does not
6 wish to pursue any claims against
7 Hearst. He doesn't have any claims
8 against Hearst. He has stated that in
9 no uncertain terms.

10 CHAMBERS: Okay.

11 The second issue?

12 MR. SWARTZ: Just one short
13 follow-up and I'll give you the second
14 issue.

15 Just to be clear, if counsel is
16 taking the position that Hearst did
17 not know he existed when they produced
18 the class list just a few months ago,
19 I don't think that's an honest
20 position.

21 Hearst knew -- he is a current
22 employee of Hearst. They knew enough
23 to -- they knew enough to find him to,
24 in one of their divisions currently
25 working there, to execute a

1
2 declaration about his time as an
3 intern, but now they're claiming that
4 they didn't know that he was an intern
5 at the company at all.

6 Either that's not true or they
7 didn't go to any diligent effort to
8 assemble the class list.

9 In any event, they certainly
10 went to much more of an effort to find
11 people to submit declarations
12 supporting their defense than they did
13 to produce a class list to allow these
14 people to have due process and the
15 opportunity to join the case.

16 The second issue is a document
17 production issue. Because of Hearst's
18 very late production of these
19 declarations after having them for at
20 least weeks, and some of them months,
21 some of them since last November, and
22 having just produced them, we're
23 taking a whole series of depositions
24 probably more than 40 in the next
25 couple of weeks.

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2 Hearst has taken the position
3 that they should not have to produce
4 the resumes of any of these witnesses,
5 even the resumes that specifically
6 describe the internship position
7 that's at issue in this lawsuit.

8 We believe that it's relevant
9 and there is no, and Hearst has not
10 stated any burden or other valid
11 objection to producing them, and so
12 they should be ordered to produce
13 them.

14 CHAMBERS: Opposing counsel?

15 MS. LANGLAIS: Our position is
16 that these are documents whose
17 existence could have been foreseen
18 prior to a few weeks before the close
19 of discovery, and if they had wanted
20 these particular documents or any like
21 them, opposing counsel could have
22 drafted document requests that would
23 have included these documents in the
24 scope, and there are fewer than 30
25 days remaining in discovery, which

1
2 does not provide us with sufficient
3 time to gather documents and respond
4 to document requests under the federal
5 rules.

6 MR. SWARTZ: A short reply,
7 please.

8 Hearst is basically saying we
9 successfully ran out the clock.

10 What Hearst is saying is we
11 produced all of these declarations,
12 more than 50 of them, at the very very
13 end of discovery, but somehow we
14 should have known that these people
15 existed and asked for their documents
16 before they produced the declarations.

17 These people, not only did they
18 not produce the declaration, but these
19 people were not even on Hearst's
20 mandatory disclosures as potential
21 witnesses.

22 You know, Hearst has argued from
23 time to time and during our meet and
24 confers that we should have known
25 about these people one way or another.

1
2 This witness was not even on the
3 class list that they provided.

4 So if Hearst hadn't produced a
5 declaration at the very last minute
6 signed by him, we wouldn't have never
7 even know he existed.

8 To say that counsel should have
9 asked for resumes of people who had
10 never been disclosed to them, it just
11 doesn't make any sense.

12 A ruling that counsel should
13 have done so would reward Hearst for
14 this tactic of waiting until the very
15 end of discovery to produce
16 declarations.

17 Again, there were declarations
18 among these 50 that were executed in
19 November of 2012 and they weren't
20 produced until the middle of January
21 of 2013.

22 The declaration in this case, of
23 this witness, was executed on January
24 2nd, and for some inexplicable reason
25 Hearst held on to it for a couple of

1
2 weeks before they gave it to us.

3 It's no secret, now that I hear
4 what counsel's argument is why they
5 did that. It was to run out the
6 clock.

7 The point of discovery is to get
8 information and be able to use it, not
9 to have a whole bunch of information
10 dumped on you at the last minute that
11 you can't use.

12 CHAMBERS: Okay.

13 Is that it?

14 MR. SWARTZ: That's it from the
15 plaintiff's side.

16 MS. LANGLAIS: Yes.

17 CHAMBERS: So could I give you
18 my e-mail address and then the
19 transcript could be e-mailed to me
20 right away and then I can forward it
21 on to the judge?

22 MR. SWARTZ: The court reporter
23 can finalize this section and have it
24 available in e-mail to you in maybe 15
25 or 20 minutes, if that's okay.

1
2 CHAMBERS: Okay.
3 My e-mail address is
4 jessica_schau@nysd.us.gov.
5 MR. SWARTZ: Okay. We'll hope
6 to get that to you in about 15 or 20
7 minutes.
8 CHAMBERS: And then do you have
9 a telephone number, just that way if I
10 get a response from the judge I'll
11 call you just so you know to check, I
12 guess so I can call you.
13 MR. SWARTZ: Yeah. I'm going to
14 give you my cell phone number so that
15 we don't have to go through the
16 switchboard to do this.
17 CHAMBERS: Okay.
18 MR. SWARTZ: 646-824-0793.
19 CHAMBERS: Okay.
20 MR. SWARTZ: We're going to
21 continue with the deposition and we'll
22 just wait for anything you can do. I
23 really appreciate you taking the time.
24 CHAMBERS: How long is the
25 deposition scheduled to go this

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evening?

MR. SWARTZ: I'd say I probably have a half hour left in this one and then there's another one scheduled for this evening that I'm not sure whether we'll get to or not.

CHAMBERS: Will this issue be raised in several of the depositions?

MR. SWARTZ: I think there are two or three depositions tomorrow, several on Thursday, and almost everyday this week and next week.

So it's going to be a recurring issue that we'd love to have a ruling on, if you can get us one.

CHAMBERS: Thank you so much.

MR. SWARTZ: Thank you so much.

* * * * *

C E R T I F I C A T E

I, Joan Ferrara, do hereby certify that the foregoing is a true and accurate transcript of my stenographic notes.

JOAN FERRARA